

South Carolina Journal of International Law and Business

Volume 13
Issue 1 Fall 2016

Article 9

2016

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Recommended Citation

Wharen, Stephanie C. (2016) "UNITED STATES V. ODONI, 782 F.3D 1226 (11TH CIR. 2015). THE INTERNATIONAL LOOPHOLE TO THE FOURTH AMENDMENT.," *South Carolina Journal of International Law and Business*: Vol. 13 : Iss. 1 , Article 9.

Available at: <https://scholarcommons.sc.edu/scjilb/vol13/iss1/9>

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UNITED STATES V. ODoni, 782 F.3D
1226 (11TH CIR. 2015).
THE INTERNATIONAL LOOPHOLE TO
THE FOURTH AMENDMENT.

*Stephanie C. Wharen**

INTRODUCTION

This case comment discusses and evaluates the Eleventh Circuit's opinion in *United States v. Odoni*,¹ which appealed criminal convictions of co-defendants Simon Odoni and Paul Gunter for their involvement in an international investment fraud scheme.² While the defendants raised many issues on appeal,³ I will focus on the most novel issue addressed by the court: whether obtaining a United States citizen's property from an agent of a foreign government constitutes a search under the Fourth Amendment and, therefore, requires a warrant in order to be lawful.⁴ This case comment particularly addresses the following: (1) whether a citizen traveling abroad has a reasonable expectation of privacy in personal belongings; and (2) whether an agent of a foreign government, particularly an agent associated with foreign law

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¹ See *United States of America v. Odoni*, 782 F.3d 1226 (11th Cir. 2015).

² See *id.* at 1229-31.

³ The United States Court of Appeals affirmed the ruling of the United States District Court for the Middle District of Florida in every issue and upheld the convictions of both defendants. Odoni's arguments included the following: (1) that the district court lacked personal jurisdiction; (2) there was insufficient evidence to convict; (3) the court erred in denying the motion for a new trial; and (4) the sentence was unreasonable. The Court of Appeals reviewed all of Odoni's arguments and ultimately affirmed the district court's decision. Additionally, Gunter's argument that the court erred in denying his motion to suppress electronic evidence due to an unlawful search was reviewed and the district court's decision was affirmed. See *Odoni*, 782 F.3d 1226 (11th Cir. 2015).

⁴ See *id.* at 1237-40.

enforcement, should be considered a “third-party.” This article takes the position that the *Odoni* decision expands the well-established, so-called “third-party doctrine” that generally finds a Fourth Amendment search has not occurred where the items examined have been previously and knowingly exposed to third parties.⁵

I. HISTORY

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶

One of the protections provided by the Fourth Amendment is to guard against arbitrary government intrusions and to provide citizens with a sense of privacy in their own matters. This goal is achieved by requiring that a search warrant be obtained prior to executing a search in order for the search to be lawful. The courts have established the exclusionary rule to protect against the Fourth Amendment becoming nothing more than “a form of words.”⁷ Generally, the exclusionary rule prohibits the use of evidence obtained in violation of the Fourth Amendment from being used against a defendant whose Fourth Amendment rights were violated.⁸

Private intrusions not conducted under the authority of the government are exempted from the Fourth Amendment’s

⁵ See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988); *Smith v. Maryland*, 442 U.S. 735 (1979).

⁶ U.S. CONST. amend. IV.

⁷ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

⁸ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

requirements.⁹ Where a private party has first searched or been exposed to the information, there is no longer a reasonable expectation of privacy, and therefore, examination of anything knowingly exposed or first searched by a third party is not a search under the Fourth Amendment.¹⁰

The advent of technology has required courts to address searches in the realm of electronic sources of evidence. In *United States v. Segura-Baltazar*, the Eleventh Circuit held that to prove an electronic search is unconstitutional, an individual needs to show that there was a reasonable expectation of privacy when the United States law enforcement entity viewed the evidence.¹¹ The Supreme Court has previously held that the Fourth Amendment's prohibition against unreasonable searches and seizures did not apply where United States agents searched and seized property located in a foreign country owned by a nonresident alien in the United States.¹² The *Odoni* decision extends that holding to apply to citizens of the United States.¹³

II. FACTS

Co-defendants Simon Andrew Odoni and Paul Robert Gunter were convicted and sentenced in the United States District Court for the Middle District of Florida.¹⁴ Simon Odoni was sentenced to 160 months in prison for one count of conspiracy to commit mail and wire fraud, one count of conspiracy to commit wire fraud, one count of conspiracy to commit money laundering, one count of engaging in illegal monetary transactions, ten counts of mail fraud, and nine counts of wire fraud.¹⁵ Odoni's convictions were a result of

⁹ U.S. CONST. amend. IV.

¹⁰ See *United States v. Jacobsen*, 466 U.S. 109, 119–20 (1984); *Odoni*, 782 F.3d at 1238 (11th Cir. 2015).

¹¹ *United States v. Segura-Baltazar*, 448 F.3d 1281, 1286 (11th Cir. 2006) (citing *United States v. Robinson*, 62 F.3d 1325, 1328 (11th Cir. 1995)).

¹² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270–75 (1990).

¹³ See *Odoni*, 782 F.3d 1226 (11th Cir. 2015).

¹⁴ *Id.*

¹⁵ *Id.* at 1230–31.

his roles in two schemes.¹⁶ The first was a fraudulent stock scheme where he held two roles that lead to his convictions.¹⁷ Odoni managed an advisor group by the name of “Bishop and Parkes” where he managed advisors, helping them write fabricated scripts in order to sell stock in shell companies.¹⁸ Odoni also was the CEO of one of these shell companies, Nanoforce, which did no actual business, although he issued press releases with false statements to incentivize victims to buy stocks.¹⁹

The second scheme was a forex-fraud scheme involving the sale of foreign-exchange options.²⁰ Odoni provided escrow services to Hartford Management Group by creating the International Escrow Enterprises, which set up accounts to receive investor funds; he received a five-percent escrow fee from the company that was participating in foreign-exchange options without informing investors of risks or placing trade hedges on the investors’ trades.²¹ Simon Odoni appealed his conviction on four grounds: “(1) [T]he district court lacked personal jurisdiction over him; (2) there was insufficient evidence to convict him; (3) the district court erred in denying his motion for a new trial; and (4) his 160-month sentence is unreasonable.”²²

For his role in the two investment-fraud schemes, Paul Gunter was sentenced to 300 months in prison for one count of conspiracy to commit mail and wire fraud, one count of conspiracy to commit wire fraud, one count of conspiracy to commit money laundering, thirteen counts of engaging in illegal monetary transactions, ten counts of mail fraud, and nine counts of wire fraud.²³ Gunter provided escrow services and managed bank accounts for both the fraudulent-stock and forex-fraud schemes.²⁴ The Norfolk Constabulary seized

¹⁶ *Id.* at 1229.

¹⁷ *Id.*

¹⁸ *Id.* at 1229–30.

¹⁹ *See* Odoni, 782 F.3d at 1230 (11th Cir. 2015).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1229.

²³ *Id.* at 1237.

²⁴ *Id.* at 1234.

electronic evidence in the UK after looking into the fraudulent stock scheme.²⁵ Due to a lack of sufficient resources, the Norfolk Constabulary asked the U.K.’s Serious Fraud Office (SFO) to step in.²⁶ During its investigation, the SFO seized several scripts for boiler rooms, notebooks, volumes of shares, computers, and boxes of documents. The SFO documented and placed all seized items in an office where only investigators had access.²⁷ Upon Gunter’s arrest in the UK, two mobile phones, a laptop computer, a thumb drive, some photo CDs, and a camera were seized.²⁸ A forensic investigator from the SFO reviewed these items in September 2007.²⁹ British authorities provided the electronic evidence to

U.S. officials in late 2007, whereupon federal agents reviewed the evidence without a search warrant.³⁰ On appeal, Gunter argued that the district court “erred in denying [his] motion to suppress electronic evidence (and the fruits thereof), which” U.S. authorities searched without obtaining a warrant.³¹

III. DISCUSSION

A. REPORT

The United States Court of Appeals affirmed the United States District Court for the Middle District of Florida’s ruling on all four issues raised in Simon Odoni’s appeal. Regarding Odoni’s argument that the court lacked personal jurisdiction due to the methods used to bring him to the United States from the Dominican Republic for prosecution, the appellate court determined it did not violate the extradition treaty between the two countries.³² *United States v. Arbane* reiterated the *Ker-Frisbie* doctrine, which holds that “a criminal defendant cannot defeat personal jurisdiction by

²⁵ See Odoni, 782 F.3d at 1236 (11th Cir. 2015).

²⁶ See *id.* at 1234.

²⁷ *Id.* at 1235.

²⁸ *Id.* at 1236.

²⁹ See *id.*

³⁰ See *id.*

³¹ *Id.* at 1234.

³² See *id.* at 1232.

asserting the illegality of the procurement of his presence in the relevant jurisdiction.”³³

First, Odoni claimed that his extradition fell within the one exception to the *Ker-Frisbie* doctrine.³⁴ “This [doctrine]...has one exception for when ‘an extradition treaty contains an explicit provision making the treaty the exclusive means by which a defendant's presence may be secured.’”³⁵ To prevail under the exception, a defendant must “demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States specifically agreed to not seize [the defendant] from the territory of its treaty partner.”³⁶ Yet, the court determined that Odoni failed to prove that the Dominican Republic’s extradition treaty, by its express terms, required the United States only to obtain him through a formal extradition request; rather, the court determined that when conditions of the treaty are met and one government requests extradition, the other will uphold the extradition.³⁷

Next, the appellate court found that Odoni’s second argument—that the evidence used to convict him was insufficient—failed because the evidence was not just sufficient, but overwhelming.³⁸ Appellate courts review evidence sufficiency claims “in the light most favorable to the government and draw all reasonable inferences and make all

³³ *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006) (citing *United States v. Noriega*, 117 F.3d 1206, 1214 (11th Cir.1997)).

³⁴ *Odoni*, 782 F.3d at 1231.

³⁵ *Id.* at 1231 (citing *Arbane*, 446 F.3d at 1225); *See also* *United States v. Alarez-Machain*, 504 U.S. 655, 662 (1992) (noting that there is “an ‘exception’ to the rule in *Ker* only when . . . the terms of the treaty provide that its breach will limit the jurisdiction of a court.”).

³⁶ *Odoni*, 782 F.3d at 1232 (quoting *United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir.1997)).

³⁷ *Odoni*, 782 F.3d at 1231-32; *see also* *Convention Between the United States and the Dominican Republic for the Extradition of Criminals*, Dom. Rep.-U.S., art. I, June 19, 1909, 36 Stat. 2468.

³⁸ *Odoni*, 782 F.3d at 1232.

credibility determinations in support of the jury's verdict.”³⁹ Here, the court considered witness testimony from two individuals who claimed Odoni discussed the fraud scheme with them in depth.⁴⁰ Additionally, the court considered circumstantial evidence of Odoni’s knowledge and involvement with fraudulent companies.⁴¹ Thus, considering the totality of the record, the court found that the evidence was more than sufficient to sustain the convictions.⁴²

On Odoni’s third claim—that the court erred by not granting a mistrial—the appellate court held that any such error was harmless.⁴³ Odoni argued that the district court violated Federal Rule of Criminal Procedure 43; the Rule states that the defendant should be at every trial stage.⁴⁴ However, the court found that Odoni’s absence from one conference call (addressing a potentially missing exhibit that was never entered during trial) did not rise to the level of being absent from a trial stage.⁴⁵

Lastly, Odoni argued that his 160-month sentence was unreasonable. The appellate court ruled that his sentence was substantively reasonable.⁴⁶ The factors Odoni argued that showed his sentence was unreasonable are codified in 18 U.S.C. §3553(a) and include his personal history, and the characteristics of the offense; Odoni also argued some factors outside the statute: his diminished role in the offense, and the proportionality of his sentence compared to those of more culpable co-defendants.⁴⁷ The court used the review standard set out in *United States v. Irey*: “We will vacate a sentence only if we ‘are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that

³⁹ *E.g.*, *United States v. Thomas*, 987 F.2d 697, 701 (11th Cir. 1993).

⁴⁰ *Odoni*, 782 F.3d at 1232.

⁴¹ *Id.*

⁴² *Id.* at 1232-33.

⁴³ *Id.* at 1233.

⁴⁴ Fed. R. Crim. P. 43(a).

⁴⁵ *Odoni*, 782 F.3d at 1233.

⁴⁶ *Id.*

⁴⁷ 18 U.S.C. § 3553(a) (2012); *Odoni*, 782 F.3d at 1233–34.

lies outside the range of reasonable sentences dictated by the facts of the case.”⁴⁸ The court determined that Odoni’s sentence was warranted and not an abuse of discretion.⁴⁹

The United States Court of Appeals affirmed the United States District Court for the Middle District of Florida’s ruling on both issues Paul Gunter appealed but stated only one issue—the denial of a motion to suppress electronic evidence—warranted discussion.⁵⁰ The Court of Appeals held the District Court correctly denied Odoni’s motion to suppress electronic evidence.⁵¹ In reviewing this issue, the appellate court had to address the search and seizure of the electronic evidence.⁵² Gunter was not appealing the seizure of the evidence by the foreign entity because of the exclusionary rule in the Fourth Amendment. This is due to the fact that in *United States v. Morrow* the court repeated the standard that the exclusionary rule cannot apply to seizures that occurred on foreign soil.⁵³ To prove that the examination of Gunter’s data files by United States agents was unconstitutional, he had to prove an objectively reasonable expectation of privacy.⁵⁴ However, the precedent repeated in *United States v. Jacobsen* states that if a private party, or foreign government agent, has searched the content prior to the U.S. government agent, the individual no longer has a reasonable expectation of privacy.⁵⁵ Since the British officials searched the electronic data before sending them to United States agents, Gunter no longer had a reasonable expectation of privacy in the data. Therefore, the agents’ search of the electronic evidence in the United States was not a violation of his Fourth Amendment rights.⁵⁶

⁴⁸ Odoni, 782 F.3d at 1233 (quoting *United States v. Irey*, 612 F.3d 1160, 1188–89 (11th Cir. 2010) (en banc)).

⁴⁹ Odoni, 782 F.3d at 1233.

⁵⁰ *Id.* at 1234.

⁵¹ *Id.* at 1240.

⁵² *Id.* at 1237.

⁵³ *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (citing *Birdswell v. United States*, 346 F.2d 775, 782 (5th Cir. 1965)).

⁵⁴ Odoni, 782 F.3d at 1238.

⁵⁵ *Jacobsen*, 466 U.S. at 119–20.

⁵⁶ Odoni, 782 F.3d at 1289.

B. ANALYSIS

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁷

In 1901, Justice Harlan stated that “[n]o higher duty rests upon this court than to exert its full authority to prevent all violation[s] of the principles of the constitution.”⁵⁸ A citizen’s right to privacy and protection from an unreasonable search is the essential principle of the Fourth Amendment.

In recent years, the Supreme Court has used the so-called “third-party doctrine” to interpret whether a search has occurred under the Fourth Amendment, and whether it leaves information collected from third parties with no protection.⁵⁹ There is difficulty in creating a meeting place, which governs how and when information should be accessible to police via a third party.⁶⁰ The difference between the generic third-party doctrine and the situation in the *Odoni* case is that the third party at play is a foreign investigative police force.⁶¹ How far can this extend? Indeed, how far should it extend?

⁵⁷ U.S. CONST. amend. IV.

⁵⁸ *Downes v. Bidwell*, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting).

⁵⁹ See Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third Party Information, Third Parties, and The Rest of us Too*, 34 PEPP. L. REV. 975, 976 (2007) (The author points out that the “third-party doctrine” affords no Fourth Amendment protection to information in the hands of a third party).

⁶⁰ See, *id.* (Pointing out the difficulty of applying the “third-party doctrine” to police usage).

⁶¹ See *Odoni*, 782 F.3d at 1234 (This is an international investigation being conducted with the aid of the International

In *Miranda v. Arizona*, the Supreme Court of the United States stated that “[w]here rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them.”⁶² In my opinion, the *Odoni* decision creates a loophole that allows the U.S. government to overreach and abrogates a federal right granted by the Constitution. Searches that would be unlawful if conducted inside the United States can now be lawful simply because a foreign entity, with drastically different laws regarding search and seizures, looked at the material first. This alone does not merit the expulsion of a citizen’s reasonable expectation of privacy. The law in the United States has set a standard that a search warrant requires probable cause, an oath or affirmation, a particular description, and due process.⁶³ Exceptions to this standard should be rare and include exigent circumstances, search incident to arrest, cars and containers, the plain-view doctrine, and consent.⁶⁴ Although it may be plausible that agents from a foreign legal authority may act as individuals to provide an affirmation or particular description, the simple fact alone that they have viewed the electronic data should not be sufficient to violate an individual’s Fourth Amendment protections. The search warrant requirement is an essential element in our justice system that should not be tossed aside lightly. The reasonableness of the search should also be addressed.

Criminal Police Organization, otherwise known as “INTERPOL,” as well as British, Spanish, and Icelandic Police forces).

⁶² *Miranda v. Arizona*, 384 U.S. 436, 491 (1966).

⁶³ See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding particularity is required in a search warrant as provided in Fourth Amendment); *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (explaining a judicial official cannot issue a valid warrant without finding probable cause given the facts presented to him under oath or affirmation); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (clarifying the right to privacy is enforceable against the states through the Due Process Clause, and the Due Process Clause protects other rights such as “right to be secure against rude invasions of privacy by state officers....”).

⁶⁴ See Jeanette D. Brooks, *Valid Searches and Seizures Without Warrants*, INST. OF GOV’T 1–4, 6–7 (2004), <http://www.ncids.org/Defender%20Training/2004%20Fall%20Conference/Exceptions.pdf>.

To determine if a search is unreasonable, a balancing test between the government interest and privacy interest must be weighed. Clearly, if there is a present emergency the justice system allows for a lower standard for Fourth Amendment privacy rights of an individual. The exigent circumstances exception takes account for this specific instance.⁶⁵ However, in situations where foreign police collect the evidence, there are no exigent circumstances present absent immediate threats of attack. The warrant requirement exemptions mentioned above exist for a reason: to keep law enforcement and the community safe.⁶⁶ I believe the foreign loophole established in *Odoni* is more of a loophole for matters of convenience rather than necessity. In *Odoni*, the government failed to obtain a search warrant because it was more convenient not to, not because they were unable to obtain one.⁶⁷ Convenience should not be a deciding factor for infringing on an individual's Constitutional rights. In my opinion, foreign obtained evidence intended to be used in a criminal proceeding in the United States against a citizen of the United States should be held to the same standard as domestic evidence; therefore, a search warrant should be executed to retrieve it. "[N]othing can destroy a government more quickly than its own failure to observe its own laws, or worse, its disregard of the character of its own existence."⁶⁸ Additionally, "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure" and this foreign entity loophole is an appropriate depiction of this standard.⁶⁹

⁶⁵ See generally *id.* at 1–2 (outlining the various exceptions available to government agents to being required to obtain a warrant, under so-called "exigent circumstances").

⁶⁶ Cf. *United States v. Robinson*, 414 U.S. 218, 231 (1973) (suggesting that officer safety and public safety were both important components of "reasonable" Fourth Amendment searches).

⁶⁷ Cf. *Odoni*, 782 F.3d 1226 (11th Cir. 2015) (suggesting that the government did not obtain a warrant out of a sense of convenience and not for reasons of exigency).

⁶⁸ *Harris v. New York*, 401 U.S. 222, 232 (1971) (quoting *Mapp v. Ohio*, 367 US 643, 659 (1961)).

⁶⁹ Wayne R. LaFave, Essay, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 *Ariz. L. Rev.* 291, 294 (1989) (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

To some, this may seem like a meaningless or unnecessary step, but it is the basis of the Fourth Amendment of the United States Constitution's "reasonable expectation of privacy" that is granted to every citizen of the United States.⁷⁰ The Government interest does not outweigh the privacy interest of an individual simply because the information sought after is obtained in a foreign country.⁷¹

C. PRACTICAL IMPACT

1. DECREASING INDIVIDUALS' FOURTH AMENDMENT PROTECTIONS

A significant practical impact of *United States v. Odoni* is its, "[expansion of] the reach of the private-search doctrine and limited the application of the Fourth Amendment."⁷² Essentially, the "private party exception" is now expanded under *Odoni* to encompass foreign law enforcement authorities.⁷³ This provides the U.S. government with a loophole around individuals' Fourth Amendment rights granted by the United States Constitution.⁷⁴ If any foreign law enforcement authority conducts a search of a particular piece of evidence, then a United States law enforcement authority would have the right to search that piece of evidence as well, regardless of the legality of the originally conducted search.⁷⁵ Treating a foreign law authority the same as a

⁷⁰ See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (establishing a "reasonable expectation of privacy" protected by the Fourth Amendment of the United States Constitution).

⁷¹ *But cf.*, *Odoni*, 782 F.3d at 1237 (suggesting that government interests are outweighed by private privacy interests when evidence is obtained in a foreign country).

⁷² *Cf.* Day Pitney LLP, *United States: White Collar Roundup*, MONDAQ (Feb. 4, 2015), <http://www.mondaq.com/unitedstates/x/371552/Corporate+Crime/White+Collar+Roundup+February+2015> (last visited Dec. 9, 2015) (explaining the expansion of the "private search doctrine" under the *Odoni* decision).

⁷³ *Id.*

⁷⁴ See *Odoni*, 782 F.3d at 1238–39; Day Pitney LLP, *supra* note 72.

⁷⁵ *Cf.* Day Pitney LLP, *supra* note 72.

private party is drastically unfair. In the United States, the Fourth Amendment does not apply to a private action, such as a neighbor finding something and turning it over to police. However, the Fourth Amendment does apply if the person is a law enforcement agent. In order to safeguard citizens' privacy rights, this standard should apply similarly in a foreign capacity as well. If a foreign individual turns something over to foreign law enforcement, which is then provided to United States law enforcement, then that evidence should be deemed acceptable under the American standard, but not if the private party viewing the evidence is a foreign law entity.

IV. CONCLUSION

The decision in *Odoni* expands the third-party exception to searches by considering foreign law enforcement officers to fall within its scope.⁷⁶ This loophole lowers individuals' expectations of privacy by following different search warrant requirements than that of the Fourth Amendment while decreasing the protections afforded by the Amendment. Nevertheless, the Eleventh Circuit in *Odoni* sets a new precedent by treating foreign law enforcement entities as private parties, eliminating the need for a search warrant if foreign law enforcement views evidence prior to turning it over to United States law enforcement. The question then becomes, "is anything private when traveling abroad?"

⁷⁶ *Odoni*, 782 F.3d at 1237.